In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS former Collector of Internal Revenue, et al., Petitioners,
v.
ALFRED I. DUPONT, RESPONDENT.

No. —

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Solicitor General of the United States, on behalf of Harry T. Graham, individually and as former collector of United States Internal Revenue for the District of Delaware, John W. Hering, individually and as successor in office of said Harry T. Graham, their deputies and others, prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Third Circuit affirming the decree of the District Court of the United States for the District of Delaware granting a preliminary injunction to restrain the collection of a Federal tax.

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QUESTION INVOLVED.

Can this suit, having for its purpose the restraining of the collection of a Federal tax, be maintained?

STATEMENT OF THE CASE.

This is a suit by Alfred I. duPont, hereinafter referred to as the respondent, against Harry T. Graham et al., hereinafter referred to as the petitioners, to restrain the petitioners from collecting by distraint or otherwise an income tax assessed against the respondent in December, 1919 (on account of income arising and accruing to him during the year 1915), in the sum of $1,576,015.86.

The respondent was one of the stockholders of the E. I. duPont de Nemours Powder Company of New Jersey at the time of the reorganization of said company and the incorporation of the E. I. duPont de Nemours & Company of Delaware, and as such a stockholder he received, on or about October 1, 1915, from the Powder Company of New Jersey 75,534 shares of the common stock of the Delaware Company by reason of his ownership of 37,767 shares of the common stock of the Powder Company of New Jersey—the common stock of the Delaware Company having been distributed as a dividend from surplus to the stockholders of the Powder Company of New Jersey on the basis of two shares of the former for each share of the latter company.

The Commissioner of Internal Revenue held the stock so distributed by the Powder Company of New Jersey to be taxable income for the year 1915 to the

distributees thereof under the Income Tax Act of October 3, 1913 (c. 16, 38 Stat. 114, 167), and determined the fair market value of each share of said stock at the time of distribution on October 1, 1915, to be $347.50. This valuation was sustained by the Court of Claims of the United States in the case of *Phellis* v. *United States*, 56 Ct. Cls. 157. The shares of stock so distributed were held to be taxable income for the year 1915 by this Court in the case of *United States* v. *Phellis*, 257 U. S. 156.

After the decision of this Court in the Phellis case the claim for abatement previously filed by the respondent was rejected by the Commissioner of Internal Revenue, and the collector for the District of Delaware was instructed to collect the aforesaid additional assessment of income tax for the year 1915, amounting to $1,576,015.86, whereupon respondent filed in the District Court of the United States for the District of Delaware a bill in equity praying for relief from the assessment and a motion for a preliminary injunction to restrain the collection of the tax.

The matter came on for hearing March 3, 1922, on the respondent's motion for a preliminary injunction and on the petitioners' motion to dismiss the bill. On June 13, 1922, Honorable J. Whitaker Thompson, sitting as Judge of the United States District Court for the District of Delaware, filed an opinion holding that petitioners' motion to dismiss should be denied and that respondent's motion for

a preliminary injunction should be granted; and on June 27, 1922, an order of the court was filed overruling petitioners' motion to dismiss the bill and granting a preliminary injunction to restrain the petitioners from proceeding to collect or attempting to collect by distraint the sum of $1,576,015.86, or any part thereof, assessed against the respondent by reason of the receipt by him of 75,534 shares of the common stock of the E. I. duPont de Nemours Company on or about October 1, 1915.

An appeal was taken from the foregoing decree of the District Court on July 25, 1922, to the United States Circuit Court of Appeals for the Third Circuit, under Section 129 of the Judicial Code of the United States. The Circuit Court of Appeals on January 3, 1923, by a per curiam opinion affirmed the decree of the District Court.

This petition is for a writ of certiorari to review such action of the Circuit Court of Appeals.

STATUTE INVOLVED.

Section 3224 of the Revised Statutes of the United States provides that—

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

REASONS FOR GRANTING THE PETITION.

1. That court erred in sustaining the jurisdiction of the District Court to entertain a suit having for its purpose the restraining of the collection of a Federal tax in view of the express prohibition ef the act of Congress above recited.

2. As hereinafter appears, the construction by that court of section 252 of the Revenue Act of 1921 is in conflict with that of the Circuit Court of Appeals for the Second Circuit in the recently decided case of *Fox* v. *Edwards* (Jan. 30, 1923) and with many decisions of this court hereinafter cited.

3. The question is of great importance not only because of the large amount of money involved but by reason of the fact that it is determinative of a large number of cases pending in the District Courts and before the Commissioner of Internal Revenue, and it vitally affects the right of the United States to collect its revenue by executive process subject to the taxpayer's remedy by suit at law to test his rights after payment under protest.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit be granted.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF THE PETITION.

1. The court erred in affirming the decree of the District Court granting a preliminary injunction to restrain the collection of the tax.

(a) A suit having for its purpose the restraining of the collection of a Federal tax can not be maintained in any court.

The obvious purpose—indeed the sole purpose—of the suit in the case at bar was to restrain the collection of a Federal tax which is due and owing to the Government under the decision of the Supreme Court of the United States in the case of *United States* v. *Phellis*, 257 U. S. 156. The statement of such a purpose should have been sufficient to sound the death knell of the complaint. Suits to restrain the collection of taxes are expressly inhibited by Section 3224, Revised Statutes of the United States.

There can be no question in the case at bar that the assessment was of a *tax* for revenue purposes, and that "penalties" such as were considered by the Supreme Court in *Lipke* v. *Lederer*, 42 Sup. Ct. 549, were not involved.

Since the assessment was of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices and under color of statutory authority, its collection can not be restrained by injunction. *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118; *Pacific Whaling Company* v. *United States*, 187 U. S. 447; *Bailey, Collector*, v.

George, et al., 42 Sup. Ct. 419; *Page, Collector,* v. *Polk et al.* (C. C. A. 1st Cir.), 281 Fed. 74; *Nichols, Collector,* v. *Gaston et al.* (C. C. A. 1st Cir.), 281 Fed. 67.

Neither the accuracy nor the validity of an assessment of a tax can be determined in a suit for injunction to restrain its collection. Such is unquestionably the law as laid down by this Court in the case of *Snyder* v. *Marks,* 109 U. S. 189, and reaffirmed in *Dodge* v. *Osborn,* 240 U. S. 118, and *Pacific Whaling Company* v. *United States,* 187 U. S. 447. This Court has repeatedly held that the payment of the tax is a necessary condition precedent to the right of a taxpayer to maintain a suit to test its validity. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Cheatham* v. *United States,* 92 U. S. 85, 88; *Bailey, Collector,* v. *George et al.*, 42 Sup. Ct. 419.

The respondent has not paid the tax, and alleges in his bill of complaint that he had not paid it. That payment of the tax is a necessary condition precedent to a right of action to test the validity of the assessment or collection was most recently affirmed by this Court in the case of *Bailey, Collector,* v. *George et al.*, 42 Sup. Ct. 419, in which Mr. Chief Justice Taft, delivering the opinion of the Court, said:

> In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest.

But regardless of the inhibition of Section 3224 of the Revised Statutes, the law in this country is, and has ever been, as stated by Mr. Justice Miller in *United States* v. *Pacific Railroad*, 4 Dill. 66, 70:

> There can be no such thing as obstructing and objecting to the payment, as in the case of adjusting the accounts of individuals.

Section 3224 of the Revised Statutes of the United States, while expressly and positively prohibiting suits having for their purpose the restraining of the assessment or collection of Federal taxes, was, after all, but an affirmation and recognition of existing law. *Roback* v. *Taylor*, 4 Int. Rev. Rec. 170; *Page, Collector*, v. *Polk et al.*, 281 Fed. 74.

(b) The assessment of the additional tax by the Commissioner of Internal Revenue was correct and valid.

The fair market value of the stock for the purpose of the assessment was taken at $347.50, as found by the Court of Claims in the case of *Phellis* v. *United States*, 56 Ct. Cls. 157. That the income was taxable was determined by this Court in *United States* v. *Phellis*, 257 U. S. 156. The discovery that the income tax return filed by the respondent for the year 1915 was false, in the sense that it was inaccurate, was discovered within three years after the said return was due. The assessment was therefore valid, in that it was made within the period of limitation prescribed by Par. E of Sec. 2 of the Income Tax Act of October 3, 1913 (38 Stat. 169), under which the tax was assessed. *Woods* v. *Llewellyn*,

252 Fed. 106; *National Bank of Commerce* v. *Allen* (C. C. A., 8th Cir.), 223 Fed. 472, 478; *Penrose* v. *Skinner*, 278 Fed. 284, 286, 287; *Eliot National Bank* v. *Gill*, 210 Fed. 933, 939; affirmed (C. C. A.. 1st Cir.), 218 Fed. 600.

In *Eliot National Bank* v. *Gill*, 218 Fed. 600, the United States Circuit Court of Appeals for the First Circuit, in construing provisions of the Corporation Excise Tax Act of August 5, 1909, similar to those contained in Par. E of Section 2 of the Revenue Act of October 3, 1913, said that (p. 602):

> The Commissioner's discovery of the facts regarding these deductions was made within three years after March 1, 1910, the year wherein the first of the three returns, afterwards found erroneous, namely, that for 1909, was due, and his assessment of the amount of the deductions was made March 1, 1913. In the case of "false or fraudulent" returns, the fifth subdivision of Section 38 of the act gives the Commissioner power "upon the discovery thereof, at any time within three years after said return is due," to make an additional assessment. *We agree with the District Court that this language does not prevent the making of the assessment after, if the discovery has been within the three years.* [Italics ours.]

The assessment was therefore correct and valid, but even if it were incorrect or invalid it could not be attacked by a bill in equity to enjoin its collection.

(c) The respondent has a plain, adequate, and complete remedy at law.

Regardless of the prohibition of Sec. 3224 of the Revised Statutes, a court of equity has no jurisdiction if the respondent has a plain and adequate remedy at law. In the case at bar the remedy at law is not only plain and adequate, but it has been held by this Court to be the exclusive remedy. *State R. R. Tax Cases*, 92 U. S. 575, 613; *Cheatham* v. *United States*, 92 U. S. 85, 88.

The court held, however, that if the complainant pays the tax after five years from the due date thereof he will have no remedy at law to recover back the tax so paid, the position of the court being that the respondent was deprived of his remedy at law to recover back the tax, if collected or paid pursuant to the assessment after five years from the due date of the return, by the provisions of Sections 250 (d) and 252 of the Revenue Act of 1921 (42 Stat. 265, 268), the former containing a five-year limitation upon suits and proceedings for the collection of a tax and the latter containing a five-year limitation (from the due date of the return) upon refunds and credits by the Commissioner, except where claims for refund or credit are filed within such five years. It is apparent, however, from an examination of the opinion of the District Court (adopted by the Circuit Court of Appeals) that neither court considered Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921 (42 Stat. 314), allowing

a period of four years after payment of the tax within which to file a claim for refund.

The finding of the court that the respondent would have no remedy to recover back the taxes if wrongfully collected after five years from the due date of the return refuses to recognize the decision of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury December 16, 1922, and published as T. D. No. 3416, which is as follows:

> A claim for credit or refund of an amount of income, war-profits or excess-profits tax, erroneously or illegally collected, may be allowed after five years from the date when the return was due, even though such claim is not filed by the taxpayer until after the expiration of the five years, if such claim is presented to the Commissioner of Internal Revenue within four years next after the payment of the tax.

The foregoing decision expresses the contemporaneous construction of the administrative department charged with the execution of the statute and should not be overruled by the courts without cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Brown* v. *United States*, 113 U. S. 568.

The construction of Section 252 of the revenue act of 1921 by the District Court, concurred in by the Circuit Court of Appeals, is contrary to the construction of said section by the Circuit Court of Appeals for the Second Circuit in the recently decided case of *Fox* v. *Edwards* (Jan. 30, 1923, unreported), in which it was held, in effect, that Section 252 is not to

be construed as containing a limitation upon the time within which a claim for refund must be filed for the purpose of commencing a suit to recover back taxes paid. The court, Rogers, Circuit Judge, said: "It simply defines the powers and duties of the Commissioner in correcting overpayments which he finds have been made."

2. This Court has power to issue the writ in the case.

That this Court has power, in a case made final in the Circuit Court of Appeals, to issue a writ of certiorari to review a decree of that court on appeal from an interlocutory order of the District Court, was decided in *American Construction Co.* v. *Jacksonville, etc., Railway*, 148 U. S. 372, 385; *The Three Friends*, 166 U. S. 1, 49.

Not only has this Court authority under Section 240 of the Judicial Code to issue a writ of certiorari to review the decree of the Circuit Court of Appeals in this case (*Lau Ow Bew, Petitioner*, 141 U. S. 583, 587, 144 U. S. 47, 58; *Forsyth* v. *Hammond*, 166 U. S. 506, 511), but it also has such authority under Section 262 of the Judicial Code (*In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268, 277).

CONCLUSION.

The questions involved in this case are of great public importance. If the collection of taxes can be restrained, as held by the Circuit Court of Appeals for the Third Circuit in this case, then, until the situa-

tion is corrected by the legislative branch of the government, it will be difficult to collect the revenue due to the United States—indeed it will be impossible, except after months and even years of costly litigation.

A number of cases involving the same questions are pending in the District Courts of the United States and are being held in abeyance pending the final determination of this case. These suits were brought as a result of Judge Thompson's order restraining the collection of the tax in this case; and unless that order is dissolved there is every reason to believe that the District Courts of the United States will soon be flooded with injunction suits to prohibit the collection of Federal taxes.

If the decision of the Circuit Court of Appeals for the Third Circuit correctly construes the Revenue Act of 1921, to the effect that the Commissioner of Internal Revenue has no authority to grant a claim for refund of taxes illegally or erroneously assessed or collected, if paid more than five years after the due date of the return, the claims for refund of many taxpayers otherwise clearly entitled to such refunds must be rejected, and Treasury Decision 3416, hereinbefore quoted, revoked. A decision of the questions involved in this case is necessary to the efficient and orderly administration of the Bureau of Internal Revenue and the collection of internal revenue taxes.

It is therefore respectfully submitted that a writ of certiorari should issue to review the decree of the

Circuit Court of Appeals for the Third Circuit, to the end that it may be reversed and an order of dismissal of the bill of complaint entered by the District Court and the temporary injunction granted by the latter court dissolved.

I am authorized to say that opposing counsel concur in this petition for the allowance of the writ of certiorari.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1923.

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